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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. 132.

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT,
PETITIONER,

vs.

MRS. MAUD E. GREEN, ADMINISTRATRIX, RESPONDENT.

BRIEF OF RESPONDENT.

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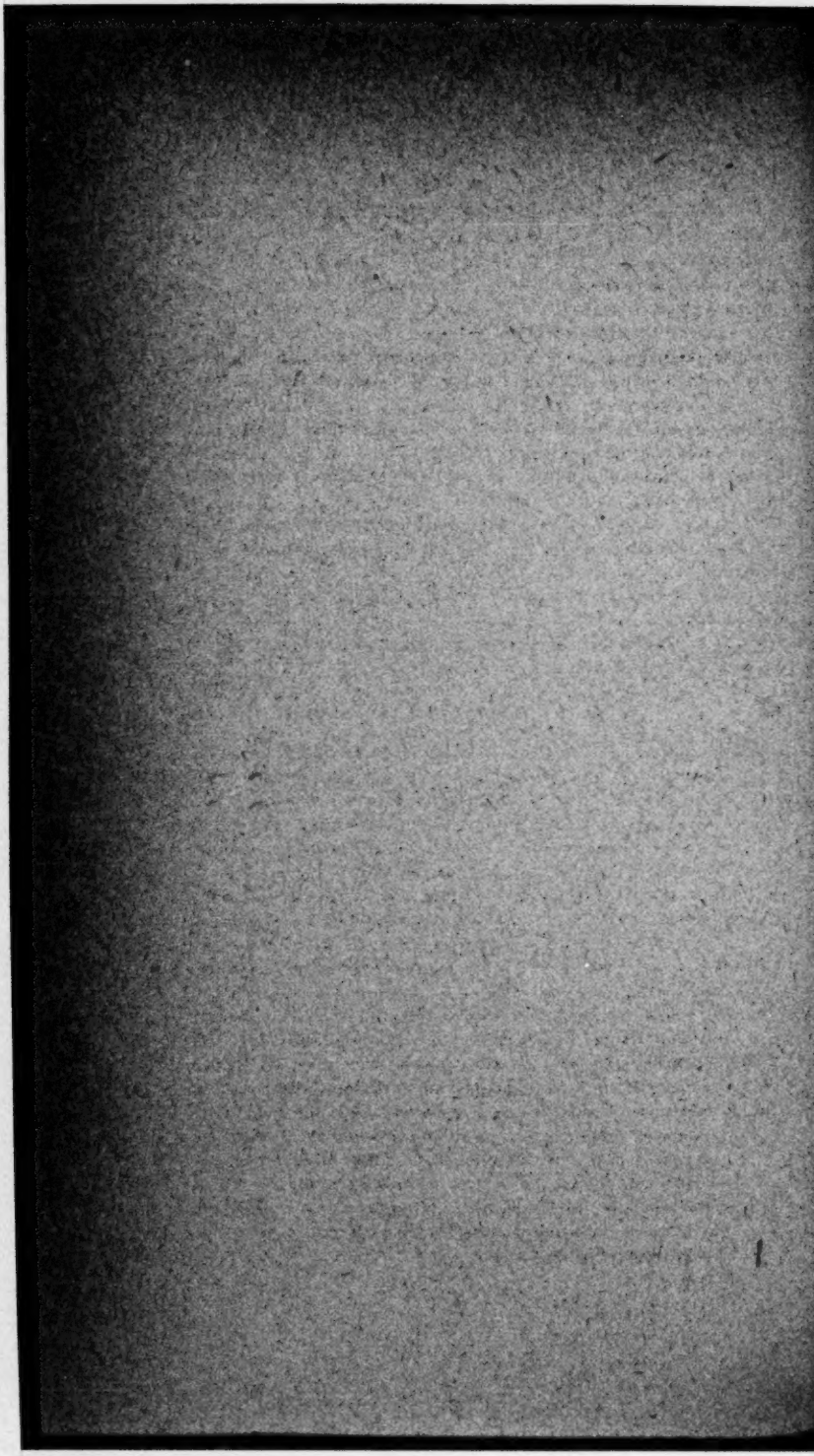

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STATEMENT AND BRIEF FOR RESPONDENT.

I.

Statement of Petitioner Not Based on Facts and Evidence Contained in Record, and is Wholly at Variance with Findings of Fact by Mississippi Supreme Court.

The Supreme Court of Mississippi, sitting in Banc, see Payne *v.* Green, 87 S. Rep., page 649, held as follows:

> (*a*) "Where a master employs a dangerous, quarrelsome, and vicious servant, or retains him in his service after knowledge of his dangerous character,

and such servant, while in the course of his employment and in furtherance of the master's business, commits an assault on another servant, who is also employed in the master's business and is acting in furtherance of the master's business, the master is liable for the injuries resulting from the wrongful assault.

(*b*) "Where a conductor of a switching crew, including an engineer, was engaged in moving an engine and passenger cars from one point in the yard to another point therein, and where to complete the movement it is necessary to pass through a switch, and where the engine was halted because the switch was not thrown, and the engineer because of such fact assaults the conductor because the switch is not thrown, so that the engine may proceed to its destination and where it was the conductor's duty to have the switch thrown, the engineer and the conductor are acting in the course of their employment, about the master's business, and the master is liable for a wrongful assault by the engineer on the conductor.

(*c*) "When applicability of the Federal Employers' Liability Act (U. S. Comp. St., Secs. 8657-8665), is involved or it is to be determined in a suit whether it is applicable or not, it may generally be determined by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as, practically, to be a part of it. *The facts in this case do not bring it within this rule, as the cars being switched neither carried interstate commerce, nor had they been used immediately before in such commerce, but were only used therein whenever the exigencies of the railroad called them into service for that purpose.*

(*d*) "Under the laws of this State the servant does not assume the risk, in cases against railroad companies, where the master is negligent."

(*e*) "Where in a suit against a railroad company for an injury to a servant no case for punitive damages is made, and where the court instructs the jury that the rules applicant to the Federal Liability Act (U. S. Comp. St., Secs. 8657-8665), governs the amount of damages, and where the verdict is in excess of the amount of the present cash value of that part of the expectancy which they could recover under such rule, but in fact the liability is governed by State law, the verdict will not be permitted to stand, unless a remittitur is entered, reducing the amount to such sum as could stand under such rule of liability.

It will be seen from the above statement in this case by the Supreme Court of the State of Mississippi in its opinion the statement of fact made by counsel for petitioner in his brief that deceased Jesse Green was engaged in interstate commerce at the time of his death is not supported by the record as interpreted and construed by the Supreme Court of Mississippi.

II.

No Federal Question Involved. Employees Not Engaged In Interstate Commerce—Case Not Governed or Controlled by Federal Employers' Liability Act.

Petitioner respectfully submits that there is no Federal question involved in this case for the reason that the employees were neither engaged in interstate commerce at the

time and place of the shooting resulting in the death of Jesse Green, the conductor.

The record in this case will show that the Gulf and Ship Island Railroad Company was chartered under the laws of the State of Mississippi, and it owned and operated a line of railroad extending from Gulfport to Jackson, both places in the State of Mississippi, and its line of railroad at no point extended beyond the State of Mississippi. There was no evidence in this record to show that this railroad company had or maintained any kind of traffic arrangements by which it completed the carriage of either passengers or freight in interstate commerce. It was shown in the record that this railroad company operated passenger trains running from Jackson to Hattiesburg and from Hattiesburg to Camp Shelby, all within the State of Mississippi. It was shown that many passengers were carried by this railroad at this time on these trains, and the number of passengers was largely increased on account of the soldiers being located at Camp Shelby, and for this reason it was shown that extra passenger cars were assigned to be used between Hattiesburg and Camp Shelby and Hattiesburg and Jackson. It was not shown that these passengers were interstate passengers and traveling on interstate transportation.

To the contrary the testimony was that the coaches involved in this suit were extra passenger coaches to be attached to a passenger train operated wholly within the State of Mississippi and to be used by such passengers as offered themselves for transportation, principally between Camp Shelby and Hattiesburg, there being no testimony showing that the Gulf and Ship Island Railroad engaged in the business of selling such passengers interstate transportation or

that the Gulf and Ship Island Railroad honored interstate transportation issued by some other railroad giving continuous right of passage over its road and using the Gulf and Ship Island Railroad as a connecting interstate carrier.

For these reasons we respectfully submit the Federal Employers' Liability Act does not control the servants of the Gulf and Ship Island Railroad while they were engaged in switching these passenger coaches in the railroad yards in Hattiesburg, Mississippi.

III.

Petitioner's Statement Not Supported by the Record.

We respectfully submit that there is no evidence in the record to support the statement made by the petitioner that the passenger cars or coal hoist were either engaged in interstate commerce at the time of this injury. The Mississippi Supreme Court states the following to be the facts relating to said cars and their movements:

> "The switching movement in the yard which was being done at the time of the killing was a movement of certain passenger cars and a coal loader and gon. The coal loader was being carried to the shops for repair and was not in use by the railroad company immediately preceding the movement, nor was it placed back in the service of loading cars for several days thereafter. The passenger cars had not been used in service on the day of the injury in any movement or on any operation for the railroad company, nor were they being carried to be cleaned for immediate use, but they were in fact placed in the service of the railroad company the day following the

injury. The passenger coaches were used both for intrastate commerce and for interstate commerce, as the needs of the railroad company called them into service. The injury occurred in the forenoon, and there was no purpose to use those cars during the day of the injury, nor was there any fixed or settled purpose to use them in such service at any particular time. Their use, or whether they would be used or not depended entirely upon the circumstances which might arise and were not controlled by any circumstance then existing, nor was there any settled purpose to use them at any particular time. They were merely used when the needs of the railroad company required their use."

The court will observe that there is a marked difference between the statement of facts as given by petitioner with reference to the use and movement of these cars and the statement of facts as given by the Supreme Court of the State of Mississippi.

IV.

Evidence of Petitioner's Witnesses Refutes His Statement of Facts as to the Use and Movements of the Passenger Car in Its Yards.

The first witness in behalf of petitioner, who testified as to the use and movement of the cars being switched in the yards, was John Gainy, a regular brakeman. He was asked:

"Q. What cars did you have that morning?
A. I did not take the numbers.
Q. Did you have two or three coaches?
A. When we were going to the south yards?

Q. Yes.

A. Yes.

Q. And were not those particular coaches used to move soldiers to and from Camp Shelby?

A. I don't know what they were used for, put them on that evening and then going to Jackson and bringing them back.

Q. Loaded with soldiers and nothing else—were not used for general passengers, were they?

A. I can't tell you.

Q. They were not used for general passengers from Hattiesburg to Gulfport?

A. No, from Hattiesburg to Jackson (R., p. 135).

Q. Unloaded them here with soldiers and carried to Jackson and loaded them and brought back the next evening?

A. Yes.

Q. That is true, is it not?

A. Yes, sir.

Q. They were not used for any other purpose except to make those trips?

A. I don't know.

Q. So far as you know?

A. Yes.

Q. You had been handling them day in and day out?

A. Saturday evening.

Q. For how long a time?

A. Ever since the camp was here.

Q. At this particular time you were taking them to the place where the cars were cleaned?

A. Yes.

Q. In order to bring them back and be loaded and carried to Jackson?

A. Yes—carried them to the south yard.

Q. Didn't you know that soldiers rode in those cars when they left here and went to Jackson?

A. Yes, sir.

Q. That is what they were used for?

A. I don't know who they loaded in them; I would be off duty when they were used.

Q. But you understood and knew they were the trains the soldiers were carried in, did you not?

A. Yes, I reckon they hauled soldiers.

Q. You knew that the coaches were set out and stood there until they were loaded the next Saturday night?

A. Yes.

Q. And were not used for anything except for that trip to Jackson on Saturday night?

A. We used so many—sometimes we would have to put coaches on other trains——

Q. You did not use those coaches down there except to haul the soldiers with? (R., p. 136.)

A. I don't know whether they loaded soldiers in cars or not.

Q. But you did not use the coaches you kept down there and handled every Saturday night and Sunday except to haul the soldiers from the Camp to Jackson in did you?

A. I don't know whether they loaded soldiers in them or not—I want to tell the truth if I can.

Q. Were the regular passenger trains made up do you know—were they made up here, Jackson, Gulfport, or where?

A. We did not make up any regular passenger trains here—no more than one or two——

Q. Don't you know that one makes up and starts at Jackson and Gulfport and passes here and all you did was to put coaches on here?

A. Yes.

Q. And those coaches were put on when they got here and loaded and for the purpose of carrying soldiers?

A. No answer."

It will thus be observed that this witness was without information entirely on the subject of the movements of the cars and knew nothing further than that simple fact that he was engaged in switching the cars in the yards when this tragedy occurred.

The next witness who testified on this subject was Mr. JACOBS (Record, pages 191-195), from which we quote:

"Q. As derrick engineer do you keep a book in which you keep records of the coal and other things you use?

A. Yes, I usually keep that.

Q. When you went up to the switch engine did you make a record of the cars and of the rolling stock being handled by the engine at that time?

A. When the sheriff got there they pulled the engine and cars on down in the yard and as they passed me I put the numbers down.

Q. What was that engine pulling?

A. Four coaches and coal hoist and a gon.

Q. What is that coal hoist—where was it being moved to?

A. From the Southern yard back home to the G. & S. I. shops.

Q. Do you know how it came to be in the Southern's yards?

A. They had borrowed it.

Q. You say it was being moved back home for what purpose?

A. I don't know.

Q. What was it used for when it got back?

A. They put it in the shop and repaired it and sent it to Jackson.

Q. That was used for what purpose?

A. Handling coal.

Q. Tell the jury how it handles coal?

A. It has a big dipper and we pick coal from the chute and throw it in and load the cars and engine with it.

Q. What engine did you load with that hoist?

A. All of them.

Q. All of the engines?

A. At that time we were using another at the shops, but that coal hoist had been to the Southern—but was the same kind.

Q. I am talking about this particular coal hoist when it was taken to the shops and repaired and was—sent where? (R., p. 192).

A. Jackson.

Q. For what purpose?

A. To coal engines.

Q. What engines was there to coal?

A. G. & S. I.

Q. And those engines were used for what purpose?

A. Freight and passenger and switch engine service.

Q. What passenger coaches were in that train?

A. As I walked down the train as they roll by I take the numbers of the coaches; the coach next to the engine was No. 20 and the second coach from the engine was No. 22, next one was No. 13 and next one No. 12.

Q. Was there anything else in that train other than the coal hoist and four coaches.

A. And the gon.

Q. What is the gon; do you know what that gon was?

A. No, sir—I had the number, it is torn out of my book. I put it down on that date and I see it is torn out.

Q. When did you make that record in that book of those coaches?

A. About thirty minutes after the killing.
Q That book been in your possession ever since?
A. Yes?"

Cross-examination:

Q. This coal hoist that you talk about, I understand it was not in service at all at the time the shooting occurred—had been borrowed by what road?

A. The Southern.

Q. Am I right in repeating that you stated it was not in service at all?

A. Not at that time.

Q. The Southern had another coal hoist it was using? (R., p. 193.)

A. They had been using it.

Q. But they had another they were using at this time?

A. Not that I know of.

Q. Didn't you say they had another?

A. The G. & S. I. had another.

Q. They had another coal hoist they were using and this so far as the G. & S. I. was concerned had been out of service some time?

A. Yes.

Q. And had not yet been returned to service?

A. Yes.

Q. The Company finally decided it would send this coal hoist to Jackson after repairing it?

A. It went up that week.

Q. After it went to Jackson did you say it was used in loading coal on the cars, etc.?

A. Yes, sir.

Redirect examination:

Q. You were asked if the coal hoist was in service—where was it being carried at the time?

A. It was put in the local next to the caboose and went north and sometime after that I was there and——

Q. Where was it being carried with that engine?

A. From the Southern's yard to the shops.

Q. Why to the shops?

A. I don't know, but they required it before it went up to Jackson.

Q. After they carried it to the shops what did they do with it?

A. Repaired it.

Q. And after being repaired what happened to it?

A. Sent it up the road.

Q. And you saw it at what point?

A. Jackson. (R., p. 194.)

Q. What did you see it doing at Jackson?

A. Coaling engines." (R., p. 195.)

The third and last witness on this subject was Mr. W. L. OAKLEY, whose testimony we quote in full. (R., pp. 198-201.)

"Q. Your name is W. L. Oakley?

A. Yes, sir.

Q. What position do you occupy?

A. Chief Dispatcher, G. & S. I.

Q. How long have you been Chief Dispatcher?

A. Since March 13, 1917—the last time.

Q. I will ask you if you have a record of coaches No. 20, 22, 13, and 12 of their movement, and for what purpose they were used?

A. Yes, we have a record in the office showing these coaches; the train they operated on, and for what purpose used.

Q. Do you know coaches M. D. K. and for what purpose they were used about August 5, 1918?

A. Yes, if I know the numbers.

Q. Take coaches No. 21, 12, 13 and 22?

A. Used on regular line—coaches operated on all rails using the G. & S. I. R. R. for any passenger business that they may be called upon to transport.

Q. They, then operated in the regular trains and regularly used for transportation?

A. They were used as regular cars or extra cars either as the occasion required.

Q. Have you the record with you? (R., p. 198.)

A. No, sir, did not bring any records with me—the train sheets are at the office.

Q. Take coaches No. 12, 13, and 20, what were they used for on the day preceding August 5, 1918, and for what purpose were they used on August 4, and on August 6, 1918?

A. They were used for the regular passenger service of the G. & S. I. R. R.

Q. In the regular passenger service what passengers were carried from Hattiesburg on August 4 and 6, 1918?

A. I would say that the cars were used in the regular passenger travel of the G. & S. I. R. R. As to dates, some of the passengers went to G. & S. I. points and possibly some went beyond the G. & S. I. R. R.

I will state that some of the passengers went to G. & S. I. points and some went beyond the G. & S. I. points.

Q. I will ask you to state whether or not those coaches were used regularly in transporting interstate passengers over the G. & S. I.?

A. Yes, they were used on the railroad for transporting all kinds of travel.

Q. What was located here with respect to the concentration of interstate passengers?

A. I don't understand.

Q. Was there any occasion at the time for the

handling of interstate passengers other than the ordinary time?

A. During that period we enjoyed a camp and we kept our extra equipment here for emergencies which would arise from time to time.

Q. Those coaches being left here and it is in evidence they were being carried down at the time to be cleaned and prepared to go back in service—were put in service to accommodate what passenger demand? (R., p. 199.)

A. Any passenger demand that the railroad might be called upon to handle.

Q. What would be the occasion of extra passenger coaches being handled from Hattiesburg at that time?

A. Because of the Camp—bringing a vast number of people here and it required more than the regualr coaches on the train at the time to carry the people who presented themselves for transportation.

Q. Do you mean soldiers?

A. Not exclusively—both.

Q. Did you handle soldiers at that time in these coaches?

A. Yes, we handled both going and coming on all trains and coaches.

Q. At that time?

A. Yes.

Q. And those passengers were being transported largely from what points to Camp Shelby?

A. I can't state off-hand from what points, but we received a vast number from the I. C.

Q. Were those interstate passengers or intrastate passengers?

A. Some of them were interstate, while others were intrastate.

Q. I will ask you if you can state, if you know, that the occasion of those coaches being left here, being the regular coaches, was for the purpose of han-

dling the intrastate passengers, being the soldiers located at Camp Shelby, in bringing them in and carrying them back?

A. That is what we kept the cars here for. (R., p. 200.)

Q. And they were used for that purpose?

A. Yes." (R., p. 201.)

Counsel states that the passenger coaches when moving were used for soldiers and that soldiers came from Indiana, West Virginia, and Kentucky, and when moving out they were destined for the Atlantic Seaboard transportation to the battle front in France.

We submit that this statement is without foundation in fact. There is no evidence that these coaches came in the morning of the day of the accident loaded with soldiers or that they were to move out loaded with soldiers, or that they were being prepared for use to transport soldiers to another State or nation. To the contrary that statement of facts by the Supreme Court of Mississippi in every respect is fully justified and warranted by the record in this case. There is nothing in this case to show on what kind or character of tickets the soldiers or other passengers were carried. It is not shown that the soldiers paid for their tickets or that the Government paid for their tickets, or where the soldiers were destined to be delivered or received. The Record stops after showing that soldiers were carried, leaving the court to infer every other material fact.

The record is positive that these coaches when used were for the purpose of accomodating any and all persons who offered themselves as passengers on said road, whether civilian or soldiers.

We therefore submit on the facts in this case there was no showing that the passenger coach involved in this controversy or the servant of the railroad company while moving them were engaged in interstate commerce.

V,

Petitioner in Error when It Charges that the Pleadings of Appellee Invokes Federal Employers' Liability Act. The Pleadings were Amended and Consolidated so as to Maintain Action under Either the State or Federal Law.

Petitioner states in his brief that the declaration and the pleas having been constructed on the theory that the plaintiff was employed in interstate commerce, and the defendant so engaged, the trial proceeded on that thory without specific proof having been introduced on this point. This statement is incorrect on both propositions. It is true that on the third day of October, 1919, Mrs. Maud E. Green and her four children brought suit to recover for the death of Jesse Green, and it is true the petitioner filed a plea to this declaration setting out that the master and the deceased conductor and engineer were engaged in interstate commerce at the time of the difficulty, and it is true that appellant plead and answered to this declaration that deceased Green assumed the risk. While the case was in this attitude and after the respondent had filed replications to petitioner's plea, in which it was denied that the deceased Green or the engineer were engaged in interstate commerce, or that Green had assumed the risk, the case was continued by the court, and it is true that Mrs. Maud E. Green was appointed ad-

ministratrix of the estate of Jesse Green, deceased, and it is true that another suit was filed by her against appellant for the death of Jesse Green, but it is not true that this declaration was filed on the theory that they were engaged in interstate commerce. To the contrary, it was not stated in the above declaration nor was it stated in any count of the first declaration that the deceased Green or other employees were engaged in interstate commerce at the time of the accident. As soon as Mrs. Maud E. Green had been appointed administratrix a motion was filed asking leave of the court to amend the first declaration by substituting her as administratrix as the plaintiff in lieu of herself as next of kin, and as next friend of her minor children. This motion was sustained and the two suits were each in the name of the administratrix, and each being based on the same cause of action another motion was filed asking that the two suits be consolidated. This motion was also sustained without objection or exception. Now the purpose of this amendment and the purpose of the new suit was not as stated by appellant to charge that deceased Green or appellant were engaged in interstate commerce at the time. The amendment and consolidation were for the reason that under the State law the suit may be brought either by the next of kin or in the name of the legal representative, at the option of the parties suing. The Federal Employers' Liability Act provides that the suit must be brought in the name of the legal representative and if this cause had been prosecuted in the name of the next of kin the appellant would have had two opportunities to defeat the action, to wit:

(1) That the deceased was engaged in interstate commerce.

(2) That the deceased assumed the risk.

If the deceased was engaged in interstate commerce at the time this alone would be sufficient, as the suit was in the name of the next of kin, who would have had no title to the cause of action in such case, and this would be a good plea in bar to the cause of action brought in the name of the next of kin.

If petitioner could show that the deceased assumed the risk this would also be a sufficient plea and bar to the action. Now if the petitioner and the deceased were engaged in interstate commerce and if the suit had been brought in the name of the administrator, the simple fact that they were engaged in interstate commerce would not be a good defense in bar to the action. Therefore in order to avoid and to prevent the petitioner having the advantage of pleading that the deceased was engaged in interstate commerce as a bar to the action, the suit was changed from a suit in the name of the next of kin to a suit in the name of the administratrix. We repeat there is no allegation in either one of the three counts of the first declaration nor is there any allegation in the amended declaration that deceased Green or the engineer or the appellant were engaged in interstate commerce at the time of the accident.

VI.

Petitioner is in Error in Stating Case was Tried on Theory that Parties were Engaged in Interstate Commerce.

On this question the Mississippi Supreme Court in this case, 87 Southern, 652, says:

> "The plaintiff contended in the court below that the liability was governed by a State law and contends in this court that this is true."

The fact is respondent contended in the trial court that petitioner's liability was to be determined by the State law, and that the Employers' Liability Act would not control. The trial court, however, held that in the facts as developed at the trial that deceased and petitioner were engaged in interstate commerce at the time of the killing and respondent's case should be tried under the provisions of the Employers' Liability Act, and respondent was forced by this ruling of the court to continue the trial in accordance with the trial court's finding on this question.

To further show that the question of fact as to whether or not the deceased Green and the appellant were engaged in interstate commerce was treated by the trial court and by the Supreme Court of the State of Mississippi as an issue of fact in the case, appellant introduced witnesses on this question. We have heretofore quoted from the testimony of such witnesses and these witnesses were cross-examined, and on the facts as developed from these witnesses and not from the pleading as stated by counsel, the trial court held that the parties were engaged in interstate commerce. After the case had been tried, and while it was on appeal before the State Supreme Court, appellee continued to insist in that court that her cause of action should be tried by the State law and that the parties were not engaged in interstate commerce. Petitioner replied to this contention by citing the court to the facts in the case, never, at any time, insistent that this question was settled by the pleading, and finally on this question of pleading and on this issue of fact the State Supreme Court held, as heretofore quoted, not only that this issue of fact was properly met by the pleading, and that the respondent on the pleading had a right to insist

that her cause of action be tried under the State law, but the court went further and sustained her contention that the parties were not engaged in interstate commerce at the time of the killing.

We submit to the court that on all questions of pleading the ruling of the State Supreme Court will be final and that the State Supreme Court has held in this case that the pleadings properly presented the question as to whether or not the parties were engaged in interstate commerce, and in addition to that also held that the facts in the case demonstrated that the parties were not engaged in interstate commerce. It may be that this ruling of the State court on this question of fact might be reviewed in this court, and the ruling of the State court on the question of pleading, that is, as to whether or not the pleadings presented an issue of fact as to whether or not the parties were engaged in interstate commerce was purely a question of procedure in the State court, and the ruling of the State Supreme Court on that subject would be final.

We therefore submit petitioner is in error when he states in his brief that the pleading settled the question as to whether or not the parties were engaged in interstate commerce, and that it was not necessary for him to inrtoduce proof on that question in the trial court.

VII.

Petitioner Pleaded the Federal Act and Therefore the Burden of Proof was on Him to Show that the Employees were Engaged in Interstate Commerce.

The petitioner, in the trial court and in the Supreme Court of Mississippi, never suggested, argued or contended that the pleadings in the cause were such as to remove the necessity of any proof as to whether the deceased, Green, was engaged in interstate commerce. In the State court the petitioner requested the trial court to instruct the jury peremptorily that the employees were engaged in interstate commerce at the time this cause of action arose, and over the objection of appellee this instruction was granted, not on the ground that no proof was necessary, but on the ground that the testimony introduced was sufficient to show that they were so engaged at the time and place of the injury complained of.

We therefore insist that the burden of proof under the law was on the petitioner to show by the record that the parties were so engaged at the time. Counsel states in his brief, on page 2:

> "The declaration and the plea having been constructed on the theory that the plaintiff was employed in interstate commerce and the defendant so engaged the trial proceeded on that theory without specific proof having been introduced on this point."

We submit that this statement by counsel for petitioner confesses that the proof introduced on the question as to

whether or not the parties were engaged in interstate commerce at the time was insufficint.

We therefore submit to the court that on the record in this case petitioner is incorrect when he assumed that this question was settled by the pleading and he is also in error when he assumed that the burden of proof was not on him to maintain this allegation of fact.

We also submit that in any case the question as to whether or not the Employers' Liability Act is to control the cause of action must always be determined by the facts in the case and no agreement, stipulation, or pleading will ever settle or control this question, the court in every instance looking to the facts in the case to find if the parties were engaged in interstate commerce and allow the facts to settle under what law each cause of action must be tried.

VIII.

No Federal Question Involved in Award of Damages.

On the question of damages the verdict in this case was for $35,000. The petitioner having objected to the amount of the verdict on the ground that it was excessive, the State court in its opinion, after first calling attention to the difference between the State law and Employers' Liability Act on the elements of damage which could be considered and on a comparison of the elements of damage which might be considered under each act, held that a much larger verdict might be sustained under the State Statute than could be sustained under the Federal Statute, and that since the State court had adopted the Federal Statute as standard, the State

court would consider the appellant's objection on the ground as to whether or not the verdict was excessive in accordance with this rule and held that the verdict was excessive, measured by this rule, and reduced the verdict to an amount much less than would have been sustained under the State Statute. Because of this fact the court's opinion then provided if appellee did not wish to accept this reduction in so far as the damages were concerned, same would be reversed and a jury impaneled to award the damages in accordance with the State Statute. In no place in this opinion can the appellant cite the court where the State court sustained a theory propounded by petitioner in this court that deceased, Green, was engaged in interstate commerce at the time of his death.

ARGUMENT.

VIII.

Petitioner in His Brief Assumes and States Facts Not Supported by the Record. Pleadings of Appellee Amended and Consolidated in Trial Court in Order to Maintain Cause Either under the State or Federal Law.

The respondent would respectfully show that the appellant continues in his brief to reassert the errors of fact contained in the original petition, and on the basis of such errors of fact proceeds to argue questions of law that appellee contends do not arise in this case. It is asserted as a fact in his brief that the declaration was filed under the Federal Employers' Liability Act, and it is asserted that the declaration

alleged that the deceased, Green, was engaged in interstate commerce, whereas, as a matter of fact, no such allegations are contained in the declaration. To the contrary, it was charged in one of appellant's pleas only, that deceased, Green, was engaged in interstate commerce, and this fact was denied by the appellee's replication, and this denial was held to be sufficient by the Supreme Court of the State.

The court, in Hines *vs.* Green, 87 So., 649, says in part as follows:

> "The original declaration was filed in three counts, alleging that the engineer was an unsafe and dangerous man to be employed and with whom to work, on account of his quarrelsome, dangerous, and vicious habits and character, which were known to, or by the exercise of reasonable diligence ought to have been known to, the appellant.
>
> "The appellant defended under the general issue, and filed certain special pleas. Among other pleas, it pleaded that the deceased and the engineer were at the time of the killing engaged in interstate commerce for the appellant, and that the liability of the appellant was covered by the Federal Employers' Liability Act (U. S. Comp St., secs. 8657-8665), and that under this act there was no liability upon the appellant for the death of the appellee's intestate. When this plea was filed by the defendant a new suit was filed by the appellee as administratrix under the Federal Employers' Liability Act, in which the acts alleged in the other suit were declared on, and it was alleged that at the time of the injury the deceased and the engineer were engaged in the business of the master and in furtherance of the master's business, bringing the case under the Federal Employers' Liability Act, and then, upon motion of the appellee,

the two suits were consolidated by the circuit court without objection, and the case proceeded to judgment, resulting in a verdict and judgment of $35,000 in favor of the appellee as administratrix.

* * * "The plaintiff contended in the court below that the liability was governed by the State law, and contends in this court that this is true."

We therefore submit that, in so far as the question of pleading is concerned, there are three answers to petitioner's position. The first is that petitioner's contention is not supported by the facts in the case, and as to this, appellee respectfully submits that the declaration did not allege, as charged in the petition, that deceased, Green, was engaged in interstate commerce, nor did the appellee in filing and prosecuting her action proceed on this theory. The record also shows that only one plea was filed by the petitioner in which it is charged that deceased, Green, was engaged in interstate commerce at the time of his death, the other two pleas being the general issue and a special plea undertaking to set up assumption of risk. The record shows that petitioner filed replications to each special plea and took issue with same, and the issue was properly joined on these questions.

Respondent also submits that it was on this theory the petitioner introduced proof in the trial court, and it was on this theory that respondent objected to the trial court's ruling that the testimony introduced was sufficient to show that deceased, Green, was engaged in interstate commerce, and continued to press this objection in the Supreme Court, and in discussing that objection in the Supreme Court of Mississippi argued only questions of fact, and it was on this theory

that the appellant in replying to respondent's objection and argument in that court also undertook to justify such ruling by also referring to the facts, never at any time making the argument in that court as he seeks to do in this, that because of the condition of the pleading no proof was necessary on the question as to whether or not the deceased, Green, was engaged in interstate commerce. Petitioner undertook to prove it in order to support his plea, and he failed to do so. Therefore, as contended by respondent in all the courts, the State law should prevail. The second answer to petitioner's position in this regard is that the Supreme Court of the State of Mississippi in its opinion in this case on the record before it decided that there was an issue on this question properly presented by the pleadings, and appellant in filing a suggestion of error in that court at no time ever suggested to the Supreme Court of the State of Mississippi that it was in error as to that part of its decision. The third answer to petitioner's position is that the decision of the Supreme Court of the State on this question of pleading is non-Federal and final, and this court is bound by the ruling of the State court in regard to such pleading.

In National Foundry Works *v.* Oconto City Water Supply Co., 46 L. Ed., 157, the court holds:

> "That questions of pleading when considered solely as questions of State practice are outside the scope of review on writ of error to a State court."
>
> Grand Rapids & I. R. Co. *v.* Butler, 159 U. S., 87; 40 Law Ed., 85.
>
> Johnson *v.* Drew, 171 U. S., 93; 43 L. Ed., 88.

Also, in the case of Allen *v.* Alleghany Co., 196 U. S., 458; 49 L. Ed., 551, it is again held by this court that the

decision of a State Supreme Court on questions of pleading is non-Federal and final.

Since the Supreme Court of the State of Mississippi has decided that the issue was properly joined, in so far as the question of whether or not the deceased, Green, was engaged in interstate commerce at the time of his death in accordance with the rules of pleading and practice in that State, appellee respectfully submits that this rule of law completely answers his petition on the question as to whether it was necessary for proof to be introduced to show that deceased, Green, was engaged in interstate commerce at the time of his death.

The next question presented is based on the contention that the testimony in the case shows that deceased, Green, was engaged in interstate commerce at the time of his death. On this proposition appellee respectfully submits that there are two separate, distinct, and complete answers; the first answer is that in any view of the case this is a question of fact and not a question of law, and the decision of the Supreme Court of the State on questions of fact is non-Federal and final. The second answer is that the finding of the Supreme Court of the State on this question is supported by the uncontradicted testimony in the record, and for this reason the writ should be denied without regard to the question as to whether it had final jurisdiction on questions of fact.

On the first proposition, we call the court's attention to the case of Allen *v.* Southern R. R. Co., 173 U. S., 479; 43 L. Ed., 775, in which this court says:

> "In inquiring whether jurisdiction to review a decree of a State court may be declined because such

> decree may be sustainable on an independent no-federal ground, the Supreme Court of the United States considered only the final action of the highest court of the State in disposing of the controversy, and is not concerned with the conclusion of the trial court or of a department of such highest court."

The record in this case shows that the Supreme Court of Mississippi decided what the facts were with regard to whether the deceased, Green, was or was not engaged in interstate commerce at the time of his death, and in making this statement we do not mean that the Supreme Court held as a conclusion that the deceased, Green, was not engaged in interstate commerce at the time, but we mean to say that the facts were found by the court and are stated by the court in its opinion in the record, and from these facts the court concluded that the deceased, Green, was not engaged in interstate commerce at the time of his death, and the point we make is not that this court is bound by the conclusion reached by the Supreme Court of the State, that the deceased was not engaged in interstate commerce at the time of his death, but that this court is bound on the finding of the Supreme Court of the State of Mississippi as to what the facts were in this record.

For authority on this proposition we respectfully call the court's attention to the case of Dower *v.* Richard, 151 U. S., 658; 38 L. Ed., 305, in which it is said:

> "The reasons against the exercise by the U. S. Supreme Court of its jurisdiction to review a judgment of a State court which rests on an independent ground of law, not involving a federal question, are as strong if not stronger when the decision of the State court proceeds upon matter of fact only."

In the case of Gardiner *v.* Bonesteel, 45 L. Ed., 574, the court held:

> "The Supreme Court in the review of action from the State court will follow the findings of facts of this court."

We understand the rule to be that this court accepts as binding the findings upon issues of fact duly made in the court of last resort in the State.

Waters-Pierce Oil Company *v.* Texas, 212 U. S., 86.
Rankin *v.* Emigh, 218 U. S., 27.
Kerfoot *v.* Bank, 218 U. S., 281.

In Christman *v.* Miller, 197 U. S., 313, it is said:

> "Findings of fact are conclusive on the Supreme Court of the United States in cases coming up from the State court."

In Chapman & D. Land Co. *v.* Bigelow, 206 U. S., 41; 51 L. Ed., 953, the court held:

> "The decision of State court upon questions of fact are not reviewable by writ of error to those courts from the Supreme Court of the United States."

And to the same effect may be found the following cases:

Keokuk & H. Bridge Co. v. Ill., 175 U. S., 626; 42 L. Ed., 299.
Jenkins v. Neff, 186 U. S., 230; 46 L. Ed., 1140.
Western Union Tel. Co. v. Call Publishing Co., 181 U. S., 92; 45 L. Ed., 765.
Bartlett v. Lockwood, 160 U. S., 357; 40 L. Ed., 445.

"Alleged errors of a State court, which involves questions either of fact or of State law and not Federal law, are not reviewable in the United States Supreme Court on writ of error."

Quimby v. Boyd, 128 U. S., 488; 32 L. Ed., 502.

"In actions at law this court has no jurisdiction to reverse the decision of the highest court of a State upon a question of fact, although a Federal question might arise, if the question of fact were decided in a particular way."

Israel v. Arthur, 152 U. S., 355; 38 L. Ed., 476.

Many other cases could be cited along the same line. We submit the above should be sufficient to sustain the proposition that the finding of the Supreme Court of the State as to the facts in this case is final.

On the discussion of the second proposition, it is necessary for the Court to compare the finding of the State Supreme Court as to the facts with the record in this case upon which such finding was made.

The testimony in the record is very short and is copied in our statement of fact, to which we respectfully refer the court.

We respectfully submit that this testimony shows that the deceased, Green, and the other employees, were not engaged in interstate commerce at the time when and the place where Green was killed. None of the cars were loaded with any kind of freight. The passenger cars were used and were to be used in trains which ran from the city of Hattiesburg to Camp Shelby or to Gulfport and Jackson, points in Mississippi. This engine and these coaches were in no sense being

used as interstate conveyances at the time and place of the tragedy. Even while they were in active use on the main line of defendant, they crossed no State line, and the fact, if it is a fact, that passengers occasionally rode therein on a journey to other States, did not make them interstate conveyances in the yards of petitioner while they were empty and being cleaned.

Volume 2, Roberts Federal Liability on Carriers, Sec. 503, states the rule to be:

> "The ordinary and usual test in determining whether switching crews employed in railroad yards are engaged in interstate commerce or whether at the very moment of the accident they are assisting in moving interstate traffic, that is, cars either loaded or empty originating in one State and destined to a place in another State, territory or foreign country."
>
> See *Erie R. C. v. Welsh,* 242 U. S., 303; 61 L. Ed., 319.
>
> *Seaboard Air Line Ry. v. Koennecke,* 239 U. S., 352; 60 L. Ed., 324.
>
> *Penn. Ry. Co. v. Donat,* 239 U. S., 50; 60 L. Ed., 139.
>
> *I. C. R. R. Co. v. Benhams,* 233 U. S., 473; 58 L. Ed., 1051.
>
> *A. G. S. R. R. Co. v. Skotzy,* 7 So., 335.

IX.

The Petitioner Pleaded Federal Employers' Liability Act. Burden was on It to Prove Act Applied. No Such Proof was Made, Therefore Act Does Not Apply.

> "When the defendant seeks to prevent recovery under the State law by showing the Federal Act con-

trols, the defendant has the burden of proof, and that the employee was engaged in interstate commerce at the time of the injury."

Roberts' Injuries to Interstate Employees, Vol. 1, Section 466, page 808.

In *Chicago, B. & Q. R. R. Co. v. Harrington*, 241 U. S., 177, the court held:

"Unless the injured employee of an interstate and intrastate carrier is engaged in interstate commerce at the time of the injury the Federal Employers' Liability Act does not apply, and it is immaterial whether such employee had previously been, or in the immediate future was to be, engaged therein."

In *Railroad Company v. Yorknis*, 238 U. S., 439, the court held:

"An employee of a carrier engaged in removing coal from storage tracks to coal chutes, is not engaged in interstate commerce even though the coal had been previously brought from another State and was to be used by locomotives in interstate hauls."

In *Shauks v. R. R. Co.*, 239 U. S., 556, the court held:

"The Federal Employers' Liability Act refers to interstate commerce in a practical sense, and the test is whether the employee at the time of the injury was engaged in interstate transportation or in work so clearly related thereto as to be practically a part thereof."

In *Minn., St. Paul R. Co. v. Winters*, 242 U. S., 353, the court held:

"When a State court applies the Federal Employers' Liability Act to an action governed by the State law, the error is not ground for reversing the judgment upon the complaint of a party who did not oppose but invoked and relied upon the application of the Federal statute."

"In such circumstances, however, this court will not pass upon question concerning negligence and assumption of risk if the facts touching the plaintiff's employment are stated and agreed and failed to make a case within the Federal Act."

"The injury occurred while plaintiff was repairing an engine. The engine had been used in interstate commerce before the injury and was so used afterwards, but there was nothing to show that it was permanently or specially devoted to such commerce or to it at the time. Held not a case within the Federal Employers' Liability Act."

In the opinion delivered in this case the Mississippi Supreme Court, 87 So., 648, says:

"The United States Supreme Court has laid down the test for determining whether the Federal Employers' Liability Act was applicable in the following language:

" 'Generally, when applicability of the Federal Employers' Liability Act is uncertain, the character of the employment, in relation to commerce, may be adequately tested by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as practically to be a part of it.' *Southern Pac. Co. v. Industrial Accident Commission*, 251 U. S., 259, 263; 40 Sup. Ct., 130, 131 (64 L. Ed., 258); *Feder-*

sen v. Delaware, L. & W. R. Co., 229 U. S., 146, 151; 33 Sup. Ct., 648; 57 L. Ed., 1125; Ann. Cas., 1914C, 153, 3 N. C. C. A., 779; *Shanks v. Delaware, L. and W. R. Co.*, 239 U. S., 556; 36 Sup. Ct., 188; 60 L. Ed., 436, 438; L. R. A., 1916C, 797; *New York C. R. Co. v. Porter*, 249 U. S., 168; 39 Sup. Ct., 188; 63 L. Ed., 536; *Kinzell v. Chicago, M. & St. P. R. Co.*, 250 U. S., 130, 133; 39 Sup. Ct., 412; 63 L. Ed., 893, 896. In *Industrial Accident Commission v. Payne*, No. 224 Supreme Court Reporter, 489.

> "Measured by this test, the facts do not bring the case within the Federal Employers' Liability Act, for the reason that none of the things being operated and moved at the time of the injury were being then used in interstate commerce, nor were they intended to be so used immediately upon being placed in condition for use, nor was there any fixed time or purpose for their early use so as to make them so intimately connected with interstate commerce as to be practically a part thereof."

We respectfully submit that this announcement of the law is applicable to the facts as shown by the record in this case is correct.

X.

No Error in Record of the Trial Court Whether Cause of Action is Controlled by State or Federal Court.

We respectfully submit that this case viewed from any standpoint, whether governed by the State or the Federal law was properly tried in the court below, the trial court. As a matter of fact the appellant sought and obtained in the trial court a more favorable announcement of the law than

it was entitled to receive. On this point the Mississippi Supreme Court, 87 Southern, 652, says:

> "There are a number of assignments of error as to instructions complained of by the appellant, but the errors, if any, are favorable to the appellant, and require more facts to be found to render liability against the appellant than the law required."

In conclusion we wish to thank the court for having granted permission for us to file this reply brief. Petitioner having failed to file his brief within the time provided by the rules of this court has made it impossible for us to prepare and present our side of this case as carefully as we should like to have done, but we feel confident that the justice of our cause will in the end be our best organ.

We respectfully request the court to affirm the judgment rendered by the Supreme Court of the State of Mississippi and to allow interest and damages as provided for by law and the rules of this court in such cases.

E. L. DENT,
J. W. CASSEDY,
Attorneys for Respondent.

I hereby certify that I have this day personally handed to Hon. T. J. Willis, Attorney of Receiver for respondent, a true and correct copy of the above and foregoing statement of facts and brief.

This November 25, 1922.

E. L. DENT,
Attorney for Respondent.